Supreme Court, U.S.
FILED
JAN 11 2002
CLERK

No. 01-874

In the Supreme Court of the United States

John Bibby,

Petitioner,

v.

The Philadelphia Coca-Cola Bottling Company,

Respondent.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Michael G. Tierce*
**Counsel of Record*

Schnader Harrison Segal & Lewis LLP
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
(215) 751-2000

Of Counsel.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether an individual who complains of same-sex sexual harassment under Title VII must prove that the "harassment" complained of was "because . . . of sex."

2. Whether an individual who complains of harassment because of sexual orientation, not because of sex, has failed to state a claim under Title VII.

TABLE OF CONTENTS

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

ARGUMENT 5

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI 5

I. THE THIRD CIRCUIT'S DECISION IS CONSISTENT WITH *ONCALE* AND LONGSTANDING TITLE VII JURISPRUDENCE 7

II. PETITIONER'S DISSATISFACTION WITH THE APPLICATION OF WELL-ESTABLISHED LEGAL PRINCIPLES TO THE FACTS OF HIS CASE IS NOT A REASON TO GRANT THE WRIT 10

CONCLUSION 12

TABLE OF AUTHORITIES

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998) 4, 5, 8

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 9

Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2000) 9

Spearman v. Ford Motor Co., 231 F.3d 1080
(7th Cir. 2000), *cert. denied*, 121 S. Ct. 1656 (2001) 9

STATUTES

Employment Non-Discrimination Act of 1994, H.R. 4636,
103d Cong. (1994) 6

Employment Non-Discrimination Act of 1995, H.R. 1863,
104th Cong. (1995) 6

Employment Non-Discrimination Act of 1996, S. 2056,
104th Cong. (1996) 6

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000 3

COUNTER-STATEMENT OF THE CASE

This case presents a narrow issue regarding whether the lower courts properly construed petitioner's same-sex sexual harassment case as involving harassment because of sexual orientation — which is not covered under Title VII of the Civil Rights Act of 1964, as opposed to harassment because of sex — which is so covered.

Petitioner John J. Bibby does not take issue with the settled legal principle that, as the Court of Appeals for the Third Circuit held and, indeed, as all federal appeals courts have held, Title VII does not cover harassment based on sexual orientation. Rather, he asserts that the Court of Appeals (and, for that matter, the district court) misconstrued the nature of his lawsuit as alleging harassment because of his sexual orientation, when, in fact, he was complaining of harassment because of sex. In other words, Bibby concedes that the Court of Appeals applied the correct legal principle, but urges this Court to grant his petition solely on the basis of an alleged misapplication of that correct legal principle to what he views as the facts of his case. As such, his case is clearly not suitable for review.

By way of background, Bibby has been employed by Philadelphia Coca-Cola from 1978 to the present and he is covered by a collective bargaining agreement. 15a.

Several incidents form the basis of Bibby's claim that he was subject to same-sex sexual harassment in violation of Title VII. First, Bibby was terminated from employment in 1993 after he was caught sleeping on the job. The union grieved his termination, and, after the parties arbitrated the

dispute pursuant to the collective bargaining agreement, Bibby was reinstated to his former position with full back pay and benefits. Bibby alleges that on the day he was reinstated, he was involved in an altercation with Frank Berthcsi, a union co-worker, on Philadelphia Coca-Cola's premises. According to Bibby, Berthcsi ordered him to leave the employee locker room and, when Bibby refused Berthcsi pushed him against one of the lockers. Berthcsi made no statements of a sexual nature during this incident. 3a, 16a.

The second alleged incident occurred two years later, when Berthcsi approached Bibby with his forklift and placed a stack of pallets under the steps of the platform, blocking Bibby's exit down that side of the steps. Words were exchanged between Bibby and Berthcsi, and Berthcsi made several derogatory statements about Bibby's sexual orientation. As a result of this incident, Philadelphia Coca-Cola terminated Berthcsi's employment. 4a.[1]

Bibby further alleged that his supervisors harassed him in various ways, none of them involving any element of sexual harassment, 4a, 17a-19a, and that the Company failed to remove in a timely manner sexually-explicit graffiti in the men's room involving Bibby. 4a.

Bibby ultimately filed a complaint with the Philadelphia Human Rights Commission, in which he alleged that he was being discriminated against on the basis of his sexual orientation. 4a. The Commission investigated the matter and issued Bibby a right to sue letter. 4a.

---

[1] After the union filed a grievance on Berthcsi's behalf, Berthcsi was reinstated subject to the condition that he undergo anger management training.

Bibby then brought suit against Philadelphia Coca-Cola and certain named individual employees, asserting a same-sex sexual harassment claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, as well as state law claims for assault and battery and intentional infliction of emotional distress. 5a. The district court dismissed both the individual defendants and Bibby's assault and battery claim. 5a. As a result, only two of Bibby's claims remained against Philadelphia Coca-Cola alone: the Title VII claim and the intentional infliction of emotional distress claim.

Discovery made clear that Bibby's claim was that he was harassed by Berthcsi not because of his sex, but because of his sexual orientation, and that he was harassed by Philadelphia Coca-Cola again, not because of his sex, but because he filed grievances and prevailed at his 1993 arbitration. *See, e.g.*, 16a-19a.

The district court thus granted summary judgment to Philadelphia Coca-Cola on Bibby's Title VII claim, holding that the evidence showed that if Bibby was "harassed," any harassment was because of his sexual orientation, not "because of . . . sex," as required to state a claim under Title VII. 29a-30a. The district court then declined to exercise supplemental jurisdiction over Bibby's remaining state law claim. 33a.[2]

The Court of Appeals affirmed. After noting that, "[i]t is clear . . . that Title VII does not prohibit discrimination based on sexual orientation," 6a, the court turned to the

---

[2] Bibby did not challenge the district court's decision not to exercise jurisdiction over his state law claim on appeal, and he does not raise that issue here.

seminal case holding that Title VII provides a cause of action for same-sex sexual harassment, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

Relying on *Oncale*, the court surveyed the established evidentiary guidelines for proving a same-sex sexual harassment case: a plaintiff must show that the harasser was motivated by sexual desire, or that the harasser was expressing a general hostility to the presence of one sex in the workplace, or that the harasser was acting to punish the victim's non-compliance with gender stereotypes. The Court of Appeals emphasized the *Oncale* holding that, "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue . . . actually constituted 'discrimination . . . because of . . . sex.'" 11a (citing *Oncale*, 523 U.S. at 81).

The Court of Appeals held that Bibby "simply failed" to meet his burden in this regard. *Id.* As the court noted, "he did not even argue that he was being harassed because he was a man and offered nothing that would support such a conclusion." *Id.* To the contrary, the court explained, "[h]is claim was, pure and simple, that he was discriminated against because of his sexual orientation. No reasonable finder of fact could reach the conclusion that he was discriminated against because he was a man." *Id.*

Moreover, in reaching this conclusion, the Court of Appeals expressly rejected Bibby's argument — an argument that Bibby emphasizes in his petition — that somehow an additional burden was being placed upon gay and lesbian plaintiffs to *disprove* that the harassment was based on their sexual orientation. As the court explained, "[w]hatever the

sexual orientation of a plaintiff bringing a same-sex sexual harassment claim, that plaintiff is required to demonstrate that the harassment was directed at him or her because of his or her sex." *Id.* But, in the court's words, "[b]ecause the evidence produced by Bibby — and, indeed, his very claim — indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII." 12a.

Bibby's petition to this Court followed.

ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

The Court of Appeals' decision is fully consistent with this Court's decision in *Oncale v. Sundowner Servs., Inc.*, 523 U.S. 75 (1998), as well as with the decisions of all of the other circuit courts that have addressed the issue. Specifically, the Third Circuit correctly held that Title VII does not cover discrimination on the basis of sexual orientation.[3] The court

---

[3] As the Court of Appeals explained, while harassment on the basis of sexual orientation has no place in our society, "Congress has not yet seen fit . . . to provide protection against such harassment . . . ." 12a. Indeed, Congress consistently has refused to enact legislation that would extend Title

(continued...)

further correctly held that, while *Oncale* permits a cause of action under Title VII for same-sex sexual harassment, the plaintiff still must prove that the alleged harassment occurred *because* of his or her sex. If a plaintiff (whether of the same or opposite sex as the alleged harasser) fails to do so, the case fails.

Bibby accepts both these well-settled principles: (1) that Title VII does not cover harassment on the basis of sexual orientation; and (2) that a litigant alleging same-sex sexual harassment under Title VII still must meet Title VII's requirement of proving that the harassment was "because of . . . sex." *See* Petition at 9-10. Bibby's argument, then, is not on the law, but on the facts: that the Court of Appeals misconstrued his case in that, contrary to the conclusions of both the district court and the Court of Appeals, his case involved harassment on the basis of sex, not on the basis of sexual orientation.

In other words, far from showing that the Court of Appeals' decision conflicts with any decision of this Court or any other court, or that there is any other reason to grant the

---

[3] (...continued)
VII to cover discrimination on the basis of sexual orientation. *See* Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1996) (proposing amendment to Title VII that would prohibit discrimination based on sexual orientation); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995) (same); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994) (same). The last attempt to pass such legislation was on June 24, 1999. To date, the amendment has not been enacted, and the class of persons protected by the Title VII does not include gay men or lesbian women who are discriminated against on the basis of sexual orientation.

writ, the petition essentially reflects only Bibby's dissatisfaction with the application of well-established law to the facts of his case. That a particular litigant is dissatisfied with the outcome of a particular case is hardly a reason for granting a writ of *certiorari*, especially where, as here, the Court of Appeals' decision is undisputably consistent with this Court's precedent and the decisions of other courts of appeals.

I. THE THIRD CIRCUIT'S DECISION IS CONSISTENT WITH *ONCALE* AND LONGSTANDING TITLE VII JURISPRUDENCE.

The Court of Appeals' decision is consistent with this Court's decision in *Oncale* and longstanding Title VII jurisprudence. In *Oncale*, this Court established the contours of a same-sex sexual harassment claim under Title VII. Specifically, while recognizing that same-sex sexual harassment is actionable under Title VII, the Court made clear that in same-sex sexual harassment cases, as in all sexual harassment cases, only harassment *on the basis of sex* is within Title VII's purview:

> Title VII does not prohibit all physical and verbal harassment in the workplace; it is directed only at "discrimination . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of

the opposite sex are not exposed . . .

Oncale, 523 U.S. at 80 (citations omitted).

To provide evidentiary guidance, the Court gave examples of how a plaintiff might show that same-sex sexual harassment constituted actionable sex discrimination: (1) where the harasser sexually desires the victim; or (2) where the harasser is motivated by general hostility to the presence of a particular sex in the workplace. *Id.* The Court was careful to note, however, that these examples were not exhaustive, and that, "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination because of . . . sex.'" *Id.*

The Third Circuit's decision is entirely consistent with *Oncale*. The Third Circuit properly held that Bibby had failed to establish a *prima facie* case of same-sex sexual harassment. Specifically, Bibby failed to establish that any alleged acts against him were the result of disadvantageous treatment to the male gender as compared to the female gender, as required under Title VII. Thus, the Court of Appeals properly found that Bibby failed to meet the statutory requirement of harassment because of sex and that no reasonable jury could have concluded otherwise.

The Court of Appeals held that there was no evidence that Berthcsi desired Bibby sexually, or that either Berthcsi or Philadelphia Coca-Cola had a general hostility to men in the workplace. *See* 11a. Indeed, the workplace at Philadelphia Coca-Cola is predominately male, particularly in the production area where Bibby works. In addition, Bibby failed to offer or

indicate the presence of any direct comparative evidence regarding Philadelphia Coca-Cola's treatment of each sex. Finally, the Court of Appeals accepted that "gender stereotyping" might be a valid means to prove same-sex discrimination under *Oncale, see* 8a-9a, but held that Bibby's claim did not implicate even this theory. 11a ("he did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave or that as a man he was treated differently than female co-workers").

Moreover, Bibby's contention that somehow the appeals court placed an "additional burden" on him to disprove his sexuality, *see* Petition at 10-11, misses the mark. The Third Circuit's decision does not require Bibby to disprove his sexuality, rather, it simply requires him, like all other Title VII plaintiffs, to demonstrate that the acts complained of occurred "because of his sex." This Bibby failed to do.

The First Circuit's decision in *Simonton v. Runyon,* 232 F.3d 33 (2nd Cir. 2000), in which the court rejected essentially the same argument that Bibby advances here, is instructive. As the court in *Simonton* explained, "[n]ot all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." 232 F.3d at 38.

Indeed, it has become clear since this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that femininity and homosexuality are far from overlapping categories; it would be unfair to group the two together for the purposes of legal protection. Courts repeatedly have ruled that "the phrase in Title VII prohibiting discrimination based on sex means that it is unlawful to discriminate against women because they are women and men because they are men." *Spearman v.*

Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1656 (2001). As the Court of Appeals noted, Bibby simply failed to meet his burden of proof: "[n]o reasonable finder of fact could reach the conclusion that he was discriminated against because he was a man." 11a.

In short, because Bibby's case was predicated only upon alleged unfair treatment and/or statements that targeted his sexual orientation, not his sex, Bibby failed to meet the threshold requirement of Title VII that the discrimination was "because of . . . sex." Accordingly, the Court of Appeals properly granted summary judgment in favor of Philadelphia Coca-Cola. The court's decision is consistent with this Court's opinion in *Oncale* and its progeny as well as with longstanding Title VII jurisprudence, and, therefore, this petition should be denied.

II. PETITIONER'S DISSATISFACTION WITH THE APPLICATION OF WELL-ESTABLISHED LEGAL PRINCIPLES TO THE FACTS OF HIS CASE IS NOT A REASON TO GRANT THE WRIT.

In his petition, Bibby apparently accepts both that Title VII does not protect victims of harassment on the basis of sexual orientation, and that to establish a same-sex sexual harassment claim, the plaintiff must show that the harassment was "because . . . of sex." *See* Petition at 9-10. But, he asserts, the courts erroneously construed his case as one based on harassment because of sexual orientation, when actually what he was claiming was harassment based on sex, in the form of gender stereotyping. *See* Petition at 7 ("the Third Circuit Court of Appeals indicated a general support for the prohibition against gender stereotyping, but dismissed protection for Petitioner

claiming that no issue of gender stereotyping was raised by the complaint"); *id.* ("[t]he Third Circuit found that the possibility that gender stereotyping had been employed by respondent was too remote since it had never been alleged by Petitioner"); *id.* at 8 ("[p]etitioner was prevented from moving onto trial because of his complaints of discrimination were characterized as based solely on his sexual orientation and not his sexual expression"). Bibby is not correct that the courts misunderstood his case, but even if he were, that is hardly a basis for granting the writ.

First, as noted *supra*, the only harassment of which Bibby complained, that was even sexual in nature, involved his sexual orientation, not his gender. *See* 2a-5a; 14a-19a. There was no conclusion to be reached other than that, as the Court of Appeals put it, "[h]is claim was, pure and simple, that he was discriminated against because of his sexual orientation. No reasonable finder of fact could reach that conclusion that he was discriminated against because he was a man." 11a.

Further, the Court of Appeals acknowledged that gender stereotyping could be an actionable form of sexual harassment, but determined that, as a matter of fact, Bibby did not allege gender stereotyping. *See* 9a. Thus, even this issue — upon which Bibby focuses his petition — does not present a cert-worthy question.

In short, Bibby's petition demonstrates only his dissatisfaction with the application of well-established law to the particular facts of his case, as well, perhaps, as his desire that the law was something other than what it is. That he is not satisfied with the outcome of his particular case is no reason for granting a writ of *certiorari*, especially where, as here, the Court of Appeals' decision is fully consistent with this Court's precedent

and the decisions of other courts of appeals.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Michael G. Tierce*
**Counsel of Record*

Schnader Harrison Segal & Lewis LLP
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103

Of Counsel.

January 14, 2001